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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-769

AUBREY D. HANSON d/b/a
HANSON PAINT & GLASS COMPANY
Petitioner,

v.

PITTSBURGH PLATE GLASS COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Now Comes the Respondent, Pittsburgh Plate Glass Company, and respectfully requests that the Petition for Certiorari be denied for the following reasons.

1. Nature of the Case and Proceedings Below

On April 10, 1968 the Plaintiff-Petitioner, Aubrey D. Hanson d/b/a Hanson Paint & Glass Company (hereinafter referred to as Hanson) filed a complaint against Defendant-Respondent, Pittsburgh Plate Glass Company[1] (hereinafter referred to as PPG) alleging a secondary-line price discrimination action under the Clayton Act, as amended, 15 U.S.C. 13.

1. The Company's name was changed to PPG Industries, Inc. on April 1, 1968.

PPG asserted a counterclaim against Hanson to recover on a promissory note of $23,983 which Hanson had executed on February 3, 1965 to cover the cost of goods which PPG had sold to Hanson over the years and for which Hanson had not paid PPG.

The case came on for trial on November 17, 1971 in the U.S. District Court for the Eastern District of Texas, Marshall Division.

The trial court entered a Summary Judgment in favor of PPG on the promissory note for the total sum of $36,388, which included interest and attorneys' fees. Hanson did not appeal that Summary Judgment.

The jury returned a verdict in favor of Hanson for $148,000. The trial court trebled that verdict to $444,000 and then awarded Hanson the additional sum of $80,000 for attorneys' fees, bringing the total judgment against PPG to $524,000.

The trial court denied PPG's motions for a dismissal, for a directed verdict and for judgment notwithstanding the verdict. Accordingly, PPG appealed to the U.S. Court of Appeals for the Fifth Circuit and that Court reversed and rendered judgment in favor of PPG. (See 482 F.2d 220).

Hanson has now filed a Petition for a Writ of Certiorari to this Court.

2. Statement of the Facts

PPG manufactures and sells various types of glass, metal and paint products. For many years PPG sold its products through its Branch store located in Shreveport, Louisiana. That Branch serviced the northern portion of Louisiana and portions of southeastern Okla-

homa, southwestern Arkansas and eastern Texas, including Harrison County, in which the City of Marshall, Texas is located.

From 1927 to 1946 Hanson was employed by PPG at its Shreveport Branch and during most of that period he solicited customers in the aforesaid territory and sold PPG products to those customers. In 1946, Hanson left PPG and opened his own store in Marshall, Texas. When Hanson left PPG, PPG replaced Hanson with another PPG salesman who continued to solicit customers on behalf of PPG in the same territory that Hanson had previously covered.

Hanson was in business from 1946 until he went out of business in 1968. During that period Hanson's net profits (or losses) were as follows:

Year	Hanson's Profit or (Loss)
1968	(undetermined loss)
1967	(undetermined loss)
1966	($ 4,930)
1965	($ 132)
1964	$ 204
1963	($13,759) *
1962	($ 2,128)
1961	($15,452)
1960	($ 6,437)
1959	N.A.
1958	$ 613
1957	($ 8,080)
1956	($ 2,874)
1955	$ 5,437
1954	$ 6,299
1953	$13,259
1952	$11,246
1951	$ 6,568
1950	$25,095
1949	$21,047
1948	$14,185

*includes fire insurance recovery of $21,056.

The above table clearly shows that Hanson's business was unprofitable from 1956 through 1968. Although the table seems to indicate that Hanson's business was profitable during the 1948-1955 period when his annual net profits averaged $12,892, in fact, his business was not profitable even then. This is true because during those same years Hanson was constantly depleting his assets; indeed, his yearly withdrawals during the 1948-1955 period averaged $14,039, or $1,147 per year more than his average profits.

Hanson was constantly undercapitalized through the entire period that he was in business. He dropped behind in his rent payments for extended periods of time and he was forced to execute or renew over 90 promissory notes to various banks in the area. In addition, PPG supplied substantial quantities of products to Hanson on credit and when Hanson was unable to pay for those products he executed a note to PPG on February 3, 1965 for the sum of $23,983. That note remains unpaid today. Moreover, Hanson purchased most of his supplies from PPG's competitors, such as Safelite and Binswanger. However, when Hanson fell behind in his payments, Safelite discontinued its business with him and Binswanger filed suit against him.

When Hanson opened his business in 1946, his was the only glass shop in the Marshall area. However, in 1952, a new company named Martex Glass Company (hereinafter referred to as Martex) started business in Marshall and became a competitor of Hanson. From that time on, Hanson's sales and profits steadily declined and thereafter in 1956 Hanson suffered a net loss of $2,874. From 1956 until Hanson went out of business in 1968, he suffered a net loss in each of those

thirteen years except for small net profits of $613 in 1958 and $204 in 1964.

In 1963 Martex' sales had climbed to $250,000, while Hanson's sales were down to $42,000, which resulted in a net operating loss for Hanson of $13,759 in that year. Moreover, Hanson suffered a crushing blow in that year when his business establishment was hit by a disastrous fire on October 29, 1963, for which Hanson was admittedly under-insured.

At the trial, Hanson confined his "proof" of alleged discriminatory transactions to the years 1964 and 1965. That tactic is explained by the fact that the Statute of Limitations commenced to run on April 10, 1964 and because Hanson purchased virtually nothing from PPG in 1966, 1967 and 1968.

Hanson's total purchases by year from all suppliers and his total purchases from PPG were as follows:

Year	Hanson's Total Purchases From All Suppliers	Hanson's Total Purchases From PPG	Hanson's Purchases From PPG As A Percentage Of Hanson's Total Purchases
1968	$ 6,777	$ 442	6%
1967	$ 5,227	$ 39	1%
1966	$ 7,626	$ 192	2%
1965	$18,795	$3,493	18%
1964	$17,589	$4,573	26%

The above table clearly shows that Hanson annually purchased 74%, 82%, 98%, 99% and 94% of his products from suppliers other than PPG. Furthermore, Hanson purchased those products from PPG's competitors at the same low prices which Hanson claimed to be discriminatory.

Accordingly, this is simply a case which primarily involves the oft-litigated defense of meeting competition. Here, however, the meeting competition facts were not only conclusively proved by PPG but also the existence of those facts was admitted by Hanson.

It is PPG's contention that the judgment of the Court of Appeals can be sustained on the ground of meeting competition alone, or on any one of the other grounds set forth by that Court.

3. Meeting Competition

At the trial, the facts concerning the meeting competition issue were proved in an incontroverted and conclusive manner, as follows:

a. PPG obtained from its customers hundreds of invoices and price lists issued by PPG's competitors to those customers. Those invoices and price lists showed the low prices at which PPG's competitors were selling their products to those customers and which prices PPG was required to meet. In total, PPG introduced over 10,000 exhibits at the trial and the bulk of those exhibits related to the meeting competition defense.

b. PPG produced witnesses at the trial (including the owner of Martex) who testified that they were purchasing products from PPG's competitors at the low prices shown on the above-mentioned invoices and price lists.

c. Hanson admitted on the stand (when confronted with invoices from PPG's competitors to him) that he regularly purchased products from PPG's competitors at those low prices.

d. Hanson's attorney never attempted to disprove that PPG's competitors were selling their products in the area at those low prices; in fact, he affirmatively elicited such testimony from the witnesses.

In view of the above-mentioned evidence, it is not surprising that Hanson states on page 3 of his Petition to this Court that the evidence concerning the meeting competition defense is "not disputed factually."

In spite of the undisputed factual evidence concerning the meeting competition defense, Hanson nevertheless requests that this Court grant a writ of certiorari. However, Hanson's contention is without merit.

Hanson asserts in his petition that PPG did not show "good faith" in meeting competition. However, that assertion flies directly in the face of the established law on the subject. That law was stated by this Court in *Federal Trade Commission v. Staley Manufacturing Company,* 324 U.S. 746 (1945), at pages 759-760:

> "We agree with the Commission that the statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor."

In view of the undenied, uncontradicted and undisputed evidence of the "existence of facts" concerning the prices at which PPG's competitors were selling their products in the area, it is clear that PPG complied with the applicable law when PPG met those lower competitive prices.

Hanson also asserts in his Petition that Hanson was "singled out and alone denied the lower prices" (p. 6 of Hanson's Petition). That statement is totally inaccurate. The overwhelming majority of PPG's products were sold exactly in conformity with PPG's Published Price Lists, and the lower priced sales that PPG did make were made specifically to meet the equally low prices of PPG's competitors.

Hanson's Petition criticizes the Court of Appeals for its holding that the meeting competition defense can be used to gain a new customer as opposed to retaining an old customer. However, it is not clear from the opinion as to the customer to whom that Court is referring. Certainly that Court could not be referring to the many customers to whom PPG had been selling for many years, that is, the customers who were solicited by Hanson on behalf of PPG when Hanson worked for PPG from 1927 to 1946, and which customers were continued to be solicited by the other PPG salesman who replaced Hanson. On the other hand, if the Court of Appeals is referring to Martex, it should be noted that Martex was a new company that started in business several years after Hanson opened his business and therefore Martex was not only a new customer but Martex was also a new company. Moreover, PPG was never able to obtain any more than 10% of Martex' requirements. Furthermore, if the Court of Appeals is referring to other customers who purchased from PPG's competitors, the record is clear that PPG lowered its prices in order to meet the equally low prices of those competitors.

It is PPG's contention that the judgment of the Court of Appeals can be sustained on the basis of meeting competition alone.

4. Availability

In Hanson's Petition, he asserts that competitive injury cannot be negated merely because Hanson had comparable products available to him at the same low prices that PPG was attempting to meet. However, Hanson fails to point out that the case at bar goes far beyond the concept of availability because Hanson was, in fact, actually purchasing from 74% to 99% of his requirements from PPG's competitors at the low prices which he claims to be discriminatory. (The table showing Hanson's purchases appears *infra* at page 5 of this Brief.)

It is PPG's contention that the judgment of the Court of Appeals can be sustained on this basis alone.

5. Causation and Damages

At the trial, Hanson limited his "proof" of discriminatory transactions to the years 1964 and 1965 and he restricted that evidence to glass products only. He then offered his profit and loss figures for each year that he had been in business from 1948 through 1968 and he then rested. That table appears *infra* at page 3 of this Brief, and it clearly shows that Hanson's operations were unprofitable for the last thirteen years that he was in business. Hanson did not offer any evidence showing that he lost any specific sales or any specific profits because of any alleged discriminatory transactions. Furthermore, Hanson offered absolutely no evidence that any competitor of his obtained any sales that Hanson lost. Moreover, Hanson failed to offer any documents that would support any such losses. In other words, there is not a scintilla of evidence in

the entire record that connects any alleged discriminatory transaction with any injury to competition or with any injury to Hanson, nor is there any evidence which shows any amount of injury to Hanson.

Furthermore, the mere listing by Hanson of his profits and losses for his entire business operation was completely inadequate to prove damages in view of the widely diversified nature of his business. At the trial, Hanson limited his proof to glass products only, but he sold many other products which he could not buy from PPG because PPG did not sell those products, such as: wallpaper, picture frames, art supplies, canvas, caulking, roofing materials, rug shampoo and rug shampooers.

The facts of this case clearly show that Hanson went out of business simply because he was a poor businessman and not because of anything that was done by PPG. That fact is clearly demonstrated by the other points raised in this Brief and by the continuous decline in Hanson's sale of products that were not even sold

by PPG. For example, following is a table showing Hanson's sales of wallpaper:

Year	Hanson's Wallpaper Sales
1948	$12,192
1949	$11,157
1950	$12,106
1951	$ 8,925
1952	$10,664
1953	$ 9,423
1954	$ 9,606
1955	$ 8,935
1956	$ 7,232
1957	$ 4,383
1958	$ 3,575
1959	N.A.
1960	$ 3,000
1961	$ 2,130
1962	$ 1,569
1963	$ 700
1964	$ 302
1965	$ 404
1966	$ 216
1967	0
1968	0

From those facts, it is clear that the Court of Appeals did not "substitute its opinion for that of the jury." On the contrary, the Court of Appeals reached the only conclusion available in view of the total absence of any evidence that would support Hanson's contentions that PPG caused him injury.

It is PPG's contention that the judgment of the Court of Appeals can be sustained wholly on the basis that Hanson failed to prove any causation or any damages.

6. Hanson's Failure of Proof and De Minimis

In addition to the points previously raised in this Brief, PPG has constantly maintained throughout this litigation that Hanson failed to prove the fundamental elements that must be established in order to make out a Robinson-Patman Act case and that any alleged discriminatory sales or any price differences were of a *de minimis* nature.

For example, the Court of Appeals cites a transaction wherein Hanson purchased a product known as Factrolite that was cut to the small, odd size of 19-3/8" x 23", at a price of 62 cents per square foot, for a total cost of $6. Hanson compared that purchase with a sale to another customer for the same product in a large standard size (or stock sheet) of 32" x 132", at a price of 35 cents per square foot, for a total cost of $20. Both the price charged to Hanson and the price charged to the other customer conformed exactly with PPG's Published Price List and each price was equally available to either customer. However, Hanson elected to purchase his Factrolite in a size that was specially cut to the specific size opening for which he intended to use it and therefore he decided to pay the higher "cut size" price that was set forth in PPG's Published Price List, whereas the other customer chose to take the large standard "stock sheet" at the lower price.

It is standard practice in the glass industry to sell and to publish different prices for standard "stock sheets" than for custom "cut sizes" and the record in this case contains many documents as well as live testimony on that subject.

Moreover, it is important to note that both of the above-mentioned Factrolite sales total only $26 and that the $6 sale to Hanson was the only purchase that Hanson ever made of Factrolite during the entire statutory period. Manifestly, those Factrolite sales are so small that they clearly can have no substantial effect upon interstate commerce and, therefore, they are *de minimis*.

Furthermore, Hanson's major complaint involved his purchases of autoglass. However, if Hanson had received the lower price which he claimed to be discriminatory on all of the autoglass that he purchased from PPG throughout the entire statutory period, the total price differential over that period of time would have aggregated the grand total of $140. Certainly a total price differential of $140 throughout the entire statutory period is clearly *de minimis*.

PPG has continually maintained (a) that Hanson has failed to prove the fundamental elements of a Robinson-Patman Act violation, (b) that the meeting competition defense has been undeniably proven, (c) that Hanson actually purchased from 74% to 99% of his supplies from PPG's competitors at the low prices which he claimed to be discriminatory, (d) that Hanson failed to prove causation, (e) that Hanson failed to prove any damages, and (f) that the doctrine of *de minimis* is applicable in this case. Accordingly we strongly contend that the judgment of the Court of Appeals can be sustained on any one of those bases.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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